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FILED
AUG 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

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INDEX

	Page
STATEMENT OF FACTS	1
ERRORS AND MISSTATEMENTS OF FACT IN PETITIONER'S BRIEF UNDER THE HEADING "REASONS FOR GRANTING WRIT"	4
REASONS ASSIGNED FOR DENYING WRIT OF CERTIORARI	10
APPENDIX A—Supplemental and Corrective Statement of Essential Facts of Case	27
APPENDIX B—Abstract of Compensation Cases Dealing with Detachment of Retina Referred to in Respondent's Brief	40
APPENDIX C—*Pruitt* v. *N. & W. Railway*	46

AUTHORITIES

Cases

Page

Bennett v. *Southern Ry. Co.*, 245 N. C. 261, 96 S. E. 2d 31 20

Creamer v. *Ogden Union Ry. & Depot Co.*, 121 Utah 406, 242 P. 2d 575, Cert den 344 U. S. 912, 97 L. Ed. 703, 73 S. Ct. 333 18

Dessi v. *Pennsylvania Railroad*, 152 F. 2d 149, Cert den 350 U. S. 936, 3 L. Ed. 2d 1073, 78 S. Ct. 1006 ..... 11, 12

Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511, 77 S. Ct. 457 ..... 11, 15, 16

Herdman v. *Pennsylvania Ry.*, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 ..... 10, 11, 19, 20

Industrial Commission of Ohio v. *Auler*, 49 Ohio App. 12, 194 N. E. 887 ..... 23, 24, 25, 41

R. G. Le Tourneau, Inc. v. *Industrial Commission*, 396 Ill. 435, 72 N. E. 2d 183 ..... 24, 25, 40

McGuigan v. *So. Pacific*, 112 C. A. 2d 704, 247 P. 2d 415 ..... 18, 19

Miller v. *Lycoming Mfg. Co.*, 135 Pa. Super. 558, 7 A. 2d 22 43

Moore v. *C. & O. Ry.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547 10

Powers v. *Consolidated Vultee Aircraft Corp.*, 61 Ariz. 362, 149 P. 2d 668 42

Pruitt v. *N. & W. Railway*, 188 Ky. 204, 221 S. W. 552 ..... 13, 46

Rogers v. *Missouri Pacific Railway Company*, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443, reh den 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 ..... 10, 15, 18, 19, 20, 25

Southern Ry. Co. v. *Bell*, 114 F. 2d 341 21

Stewart v. *B. & O. Ry. Co.*, 137 F. 2d 537 22

Page

Stone v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358 reh den 345 U. S. 914, 97 L. Ed. 1348, 73 S. Ct. 639 22

Tiller v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 187 L. Ed. 610, 63 S. Ct. 444 18

Webb v. *Illinois Central Railway Company*, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451 reh den 353 U. S. 945, 1 L. Ed. 2d 764, 77 S. Ct. 809 10

Wood v. *W. E. Joyce Co., Inc.*, 228 App. Div. 729, 239 N. Y. Supp. 110 45

STATUTE

45 U. S. C. A. Sec. 51 et seq and 51 U. S. C. Sec. 51 to 59 10

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STATEMENT OF FACTS

We regret that the many erroneous statements of fact in the petitioner's brief necessitate that this brief be longer than it ordinarily would have been had such misstatments of fact not occurred and also had the petitioner presented a statement of essential facts sufficient to afford a clear understanding of the legal principles invoked and involved in this case.

The petitioner states at page 4, and throughout his petition, that the truck Crookham was loading was "an old-fashioned high bedded, non-dump truck"; that its bed was one foot higher than an "ordinary bed". The truck the men were loading was a 1951 flat bottom Dodge truck which stood four feet above the ground (R. 144). The

alleged accident occurred December 28, 1955, so the truck was only four years old. This is the only evidence as to the type of truck being loaded that day. There is no evidence that this was an old-fashioned high bedded truck nor is there any evidence that the bed of an ordinary truck as usually used by the respondent stood three feet above the ground; although it is true that there is evidence that the back end of a dump truck, with the front end elevated, will be about three feet from the ground. (R. 49). Likewise the ties were not water soaked in the sense that term is ordinarily used. The ties were in the ballast bed of the passing track, but they had not been lying in water as the term "water soaked" would indicate.

On pages 4 and 5, it is stated that the foreman, Whittington, admitted that the customary and accepted method of loading ties was by the use of tie-tongs; that had he been present he would not likely have permitted the men to load the ties in such a manner, or with such a number of men. This is not accurate. Whittington testified:

> "Q. Now what is the safest and easiest way to load ties on the truck which Mr. Sayre had?
> A. By hand.
> Q. In what way? How by hand?
> A. By just taking a bar, loosening the tie, picking it up, tossing it on the truck. If you take tongs, you have to lift above your head to stack them on the truck." (R. 216),
>
> * * *
>
> "Q. Then you use tongs to load the big ones?
> A. If they go in end-wise. Sidewise you wouldn't." (R. 227).
> "Q. Have you ever loaded a main line tie (a big one) a distance of four feet. Just using two men?
> A. No but I have loaded them with three men." (R. 227).

The statement on page 5 of petitioner's brief alleges that the loading of the ties was "* * * with, in the main, a three man crew." The facts are that at least two thirds of the time the ties were lifted on the truck with a four man crew. (R. 59).

It is also there stated that when one of the four men left, Crookham's lifting burden and strain were "many times doubled". This, of course, is patently absurd.

It is not true, nor can it be concluded as stated on page 6 of petitioner's brief, that tie-tongs were not furnished and available to the petitioner. Whittington testified (R. 228-229):

> "Q. Now, did you not testify here yesterday that you have only two pair of tongs in the truck on that job?
> A. Yes.
> Q. So you were using the tie-tongs to drag the fence post with?
> A. No.
> Q. I thought you said a moment ago you were?
> A. We was cleaning right of way, getting brush out."

It is true that there were only two sets of tie-tongs on the job, but it is not true that the ties were always taken to the post holes by a pair of tongs, as stated in petitioner's brief. The men carried the crossties, which were to be used for fence posts, by hand and sometimes by use of tie-tongs from the side-track to the right of way fence. Crookham testified, on direct examination:

> "Q. On this morning of the 28th of December, '55, you said you were building fence for about two hours. What kind of posts were you using?
> A. Ties.
> Q. Second hand ties out of the passing tracks?
> A. Yes, sir.

Q. How were you lifting those ties on this morning from the road bed to the right of way of the fence, by hand or by tongs?

A. Sometimes by hand and sometimes by tongs." (R. 52).

ERRORS AND MISSTATEMENTS OF FACT IN PETITIONER'S BRIEF UNDER THE HEADING "REASONS FOR GRANTING WRIT"

Under "1 (a)" petitioner states that these ties were "switch ties". This is just a plain misstatement of fact. Switch ties are longer and heavier than cross-ties. All the witnesses, including Crookham, testified that the ties being loaded were cross-ties, which are eight and a half feet long. Crookham said (R. 82) when asked how long the cross-ties were, "eight and a half feet".

The statement under "1(b)" that the employer failed to supply Crookham with safety tie-tongs and required him to load, by hand, an old-fashioned high bedded truck, the like of which he had never loaded before, is not true. Regarding the tie-tongs, as pointed out in the statement of facts, the employer did supply them. They were available and on hand where the men, including Crookham, were working; but none of the men, including Crookham, evidently thought tie-tongs were either necessary or useful. After his experience in loading the Sayre truck in the morning, without tie-tongs, Crookham went back, in the afternoon to load the truck again without tongs. There is no evidence that the employer required Crookham to load the truck by hand. They could have loaded the truck any way they wished. All were experienced section men, with many years of service, and two of them, including Crookham, had been section foremen. The work was not of an unusual type but only required that three or four men lift ties varying in weight from 125 to 220 pounds, or at the most 73.3 pounds weight for each man

if three were lifting. As pointed out previously, the Sayre truck was not an old-fashioned, high-bedded truck, nor was it one the like of which Crookham had never loaded before.

On page 10, paragraph 4, the petitioner places significance upon the fact that the railroad did not produce medical witnesses of its own. The respondent relies on the testimony of the petitioner's medical witnesses. Dr. Pensmidt said that he believed that lifting cross-ties *could* have been an inciting cause, and Dr. Humphries stated, "It is not beyond my belief that this (lifting ties) could have been a factor." However, Dr. Pensmidt also testified:

> "Q. I believe you stated that he (the patient) had arteriosclerosis in keeping with his age, which at the time was 62?
>
> A. Yes, sir.
>
> * * *
>
> Q. And nearsighted persons are more prone to have detached retina than farsighted persons. That is your observations and according to reports made by persons who have made a study in this particular field?
>
> A. Yes, sir.
>
> Q. Now, a person can have a detached retina from a very minor lift, can they not?
>
> A. Yes, sir. (R. 104).
>
> Q. You also know, do you not, doctor, that a person who is nearsighted and who has had a certain amount of deterioration due to age, could have a detached retina with a very slight amount of physical energy?
>
> A. I think that is true.
>
> Q. It would not be necessary for him to be lifting any object, just average labor, that could do it?
>
> A. It could.
>
> Q. Of course, you don't know what caused this one?
>
> A. No, sir. (R. 105-106).

On direct examination, Dr. Pensmidt testified:

> "A. * * * He (Crookham) further stated that on the previous night he had noticed a brilliant flash of light like *lightening* on going to bed. On the previous day, that is the day before, he said that he had been doing heavy lifting of railroad ties; that he had never done any other type of work. (R. 97).

Dr. Humphries testified:

> "Q. * * * And is it not also true that a person can have a detached retina, especially those after they get fifty, when they don't have any extra exertion, but it may come with a normal amount of exertion?
> A. That's true." (R. 246).

Dr. Humphries further testified that a detached retina may occur from coughing, lifting sacks of wheat, etc. (R. 243).

Neither Dr. Pensmidt nor Dr. Humphries attempted to say what caused the detached retina in the left eye of Crookham. They only state that a man of his age, who is nearsighted, *could* have a detached retina from normal work, from a slight jar, from moving a table, or just average labor. Dr. Pensmidt stated he did not know what caused the detachment in Crookham's eye. He merely says any number of things could have produced it.

On page 10, paragraph 5, of petitioner's brief, it is stated that "The trauma sustained by Crookham *was the competent producing cause of the detached retina*". (Emphasis supplied). To begin with, this statement makes the quite unwarranted assumption that "trauma" was involved in this case. Furthermore, as shown previously and in the Appendix, pages 35-40, neither doctor would state what actually caused the detachment.

Dr. Pensmidt testified, in response to a question of plaintiff's counsel, as to the inciting or producing cause of the detached retina, that:

> "A. Yes, I do believe the lifting of the cross tie *could* have been the inciting cause." (R. 103). (Emphasis supplied).

We respectfully submit that there is a vast difference between the use by the doctors of "*could* have been the inciting cause" and the use by counsel for petitioner of the phrase, "*was* the competent producing cause."

Dr. Humphries, testifying regarding the work involved in lifting ties, stated as follows:

> "And it is not beyond my belief that this could have been a factor. Not the main factor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 243).

The emphasis placed on the height of the truck (four feet) is, we believe, without any merit whatsoever. The tie would weigh the same whether it was lifted one foot, two feet, three feet or four feet. Crookham stated that there was nothing unusual for a section man to lift 100 pounds, as he had done many times. In the few instances in which the men were lifting ties of the maximum weight of 220 pounds, the most that any employee would be lifting when three men were loading would be only 73.3 pounds and when four men were loading 55 pounds. On 125 pound ties the weight for each man would be 42 pounds on a three man crew and 31 pounds on a four man crew. Most of the ties, being from a passing track, were of the lesser and not the greater weight.

There is no statement in the record, and a careful reading of the record cited by the petitioner, pages 144-145, will not sustain the assertion that Crookham was lifting ties at a height he had never been called upon before to lift. The assertion, page 14 of petitioner's brief, that "The foreman knew that the four men loading ties had no tie-tongs (R. 225), and also knew that there was not a sufficient number of tongs on the job to accommodate two crews," is a plain distortion of the facts. The truth is that there were two sets of tongs on the job, but that the crew loading the truck was not using them nor were the foreman and the other three men who were cleaning the fence row using them. They were not being used by anybody. They were available and near at hand to Crookham and the crew, if they had wished to use them. No employee suggested their use in loading the truck, or objected to the manner or method of loading the truck.

An attempt was made, page 14, paragraph 8, to infer that the foreman was indifferent to Crookham's injury. This distortion is limited only by the ingenuity of plaintiff's counsel. Crookham testified:

> "Q. Now, Ray the first time you told foreman Whittington about any eye trouble was the next morning after the 28th, up at Arbuckle, when you reported to work?
>
> A. Yes.
>
> Q. And at that time he asked you how your eye was, didn't he?
>
> A. I reported my eye blacked out. He said, 'You want to go to a doctor'. I said I didn't know what happened, it might get all right.
>
> Q. In other words, foreman Whittington asked you if you wanted to go to a doctor and you told him you thought it would be all right?
>
> A. Yes.
>
> Q. You worked the next day?
>
> A. Yes.

Q. And the next day he made inquiry about how your eye was?

A. Yes.

Q. And you said, about the same?

A. Yes. (R. 87).

Again in paragraph 10 on page 15 of the petitioner's brief, it is assumed that the doctors testified that the detached retina of Crookham's eye *was* caused by the lifting of the ties when as a matter of fact no doctor so testified. As Dr. Humphries stated the lifting of the ties would not be a primary cause but only a secondary contributing cause. He testified that "And it is not beyond my belief that this could have been a factor. Not the main factor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 243). Again on page 22, petitioner's counsel make the statement in reference to the doctors: "They testified that the trauma sustained by Crookham *was* the competent producing cause of the detached retina." (Emphasis supplied). No doctor stated that lifting ties "was" the competent producing cause of the detached retina. Dr. Pensmidt testified that he did not know what caused the detachment in Crookham's eye. (R. 106, page 5 this brief). They only stated it "could" be such cause, and Dr. Pensmidt explained that it was more likely to occur in lifting railroad ties than with balloons, "but that wouldn't mean that healthy, normal people couldn't lift railroad ties". (R. 112).

The quotation from the opinion of the Supreme Court of Appeals of West Virginia, page 19, being incomplete, is misleading. The full statement is:

> "The only direct evidence which can be hinted to as tending to show that plaintiff's injury occurred because of, or was occasioned by, the load-

> ing of the Sayre truck, is his own statement that 'it just felt like salt in my eye.'
>
> "This, however, can hardly be evidence tending to show that the detachment occurred or was occurring at the precise time he was loading the truck in view of the following undisputed evidence: 'Q. On detachment of the retina there is no pain? A. No. It can't happen. Pain-wise you just don't know you got it.'"

That the petitioner doggedly deduces from this that the Supreme Court of Appeals of West Virginia had negligence in mind is representative of his ragged ratiocination throughout his petition and to condone and approve such misty conclusions would be to permit "speculation run riot" which this court condemned in *Moore* v. *C. & O. Ry.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547, and *Herdman* v. *Pennsylvania Ry.*, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508.

REASONS ASSIGNED FOR DENYING WRIT OF CERTIORARI

The pertinent part of Section 51, Title 45 of the United States Code, Annotated, provides:

> "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person *suffering injury* while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (Emphasis supplied).

The modern rule in F. E. L. A. cases was announced by this Court on February 25, 1957, in *Rogers* v. *Missouri*

Pacific Railway Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, reh den 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764; *Webb* v. *Illinois Central Railway Company*, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451, reh den 353 U. S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 809; *Herdman* v. *Pennsylvania Railway Company, supra*, and *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511, 77 S. Ct. 457. Syllabus 7 in the *Rogers* case lays down the rule for the test of a jury case. It declares that:

> "The test of a jury case in an action to recover for personal injuries under the Federal Employers' Liability Act is whether the proofs justify with reason the conclusion that the employer's negligence played even the slightest part in producing the injury or death for which damages are sought; when this test is met the judge must find that a jury case exists notwithstanding that, from the evidence, the jury may also, on grounds of probability, reasonably attribute the result to other causes, including the employee's contributory negligence."

The Supreme Court of Appeals of West Virginia, in deciding the Crookham case, followed this rule and quoted extensively from the *Rogers* case. (See page 12a of petitioner's brief) The issue now before this Court on the application for this writ is whether the facts in the Crookham case fit this rule and the language of the act itself that there must be some *negligence*, however slight, and that there must be an *injury*. In *Dessi* v. *Pennsylvania Railroad*, 152 F. 2d 149 (decided January 1958), certiorari denied, May 26, 1958, 350 U. S. 936, 3 L. Ed. 2d 1073, 78 S. Ct. 1006, the United States Court of Appeals, Third Circuit, held in syllabus 3:

> "In action by mechanic against railroad under Federal Employers' Liability Act for injuries sustained when handle of jack, with which he had jacked up corner of railroad car, allegedly struck

him on the back of the head, mechanic was not entitled to have jury pass on issue whether failure of railroad to adopt safer method of work caused accident in part *merely by proving that there was a safer method of doing the job*, that mechanic was knocked unconscious, and that jack handle was found on the ground. Federal Employers' Liability Act as amended 45 U. S. C. A. § 51 et seq." (Emphasis supplied).

In the *Dessi* case the court held that the employee was not entitled to have a jury pass on the issue of whether or not the failure of the railroad to adopt a safer method of work constituted negligence when the plaintiff merely proved that there was a safer method of doing the job. In the Crookham case it is argued that it would have been safer for Crookham and the others to use tie-tongs to load the truck, even though the foreman and all of the section crew who were doing the work testified that it was much safer to do the work without tie-tongs. However, by the rule laid down in the *Dessi* case (in which certiorari was denied by this Court), the inference advanced in petitioner's brief, i.e., that a safer method to load the truck would have been by the use of tie tongs, does not make out a case for a jury determination.

The four acts of alleged negligence as set out on page 6 of petitioner's brief and the answers thereto are as follows:

(1) The Charge:

"In not furnishing and supplying a foreman to go with and supervise the 4-man crew in loading the ties."

The Answer:

(a) It was not necessary for a foreman to be present on this kind of a job when all the men are workmen of many years' experience and two of the four, including Crookham, had been section foreman. Crookham was the

oldest employee in point of service, including the foreman. The work of lifting cross-ties, which weighed from 125 to 220 pounds apiece, from the ground and loading them onto the back end of a truck four feet above the ground was not hazardous work. All of the men were familiar with the kind of work to be done, the tools necessary to do it with, and they, themselves, selected a lining bar rather than tie-tongs as the only tool necessary, convenient or useful in loading the truck. The lining bar was used only for the purpose of prying loose any tie that might be stuck in the ballast so that it could be picked up by hand. The heaviest tie, if four men were lifting it, would place a weight of 55 pounds on each man and if three men were lifting it, it would place a weight of 73.3 pounds on each man. All the section crew, including the plaintiff, testified that they had sufficient men to load the ties. (R. 81) The plaintiff himself stated that a section man should be able to lift 100 pounds without any difficulty. (R. 81). The foreman testified that if he had accompanied the men he would not have permitted them to load the ties with tongs but would have directed that they load the ties by hand, for that was the safest way to load them. It is not necessary to have a foreman present for the performance of a simple task, with which a crew is familiar and has performed many times.

In *Pruitt* v. *N. & W. Railway*, 188 Ky. 204, 221 S. W. 552, a F. E. L. A. case, the court held that a foreman of a section crew need not personally supervise a single operation which can be performed by any workman of ordinary intelligence. (See Appendix, pages 46-47, for a fuller discussion of this case.)

The crew that loaded the ties in the Crookham case were all workmen with many years of experience. One of the employees, Plants, had been a foreman before the accident and was acting as a foreman at the time of the trial. Crookham had, for a while, worked as a foreman.

Here were experienced laborers who were charged with the simple operation of loading a truck with ties, and we respectfully submit that no foreman was necessary to tell each individual laborer every single move he was to make. Certainly American labor has not reached the point where they are to be treated as mere automatons and a foreman or supervisor is required to stand over them and instruct them in every particular as to what they must or must not do.

(b) There is no evidence that Crookham would not have had a detached retina if the foreman had been present or if four or five or six men had been used in loading the ties or if tie-tongs had been used.

(c) Crookham had loaded ties on a push car before. (R. 82) He had loaded ties on company trucks that were not dump-trucks. (R. 48) He had loaded ties on individual's trucks before with only three men and with no tongs. (R. 86)

(2) The Charge:

"In not furnishing petitioner with sufficient number of safety tie tongs (designed so that no number of men less than four could use the same) customarily used in handling and loading ties. (A fact found by the jury)."

The Answer:

In the first place, the assertion that the tie-tongs were designed so that not "less than four could use them" is inaccurate and misleading. Tie-tongs require only two men—no more, no less. Furthermore, the jury did not find that Crookham was not furnished a sufficient number of tie-tongs. The special interrogatory was: "Should the section crew have used the tie-tongs to load the ties on the Sayre Truck?", not "that the tongs were not available." (R. 15). Two sets of tongs were furnished and available if the men, including Crookham, had wanted to

use them. Crookham testified that the company had furnished the tongs and that they were available but that the men did not use them either in the morning or in the afternoon loading. (R. 75) The foreman testified that the remainder of the crew who were cutting brush were not using the tie-tongs at the time of the alleged "injury". Both sets of tongs were available and close at hand if Crookham and his crew wanted to use them.

In *Ferguson v. Moore-McCormack Lines, supra*, decided the same day as the *Rogers* case, a ship's baker was using a sharp butcher knife to remove hardened ice cream from a container in order to fill orders placed with him by the ship's waiter. He struck a hard spot in the ice cream causing his hand to slip down on the blade of the knife. The question arose whether the baker's employer was negligent in failing to furnish him with an adequate tool with which to perform his task. The employee testified that, although hard ice cream could have been loosened safely with an ice chipper, the employer, Moore-McCormack Lines, had not furnished him with such an instrument. The Court held that, "the jury may conclude that the employer furnished the baker no safe tool to perform his task and should have foreseen that the baker might have been tempted to use a knife to do the work with dispatch." (Part of Syllabus 1). In the body of the opinion, it is stated: "There was no showing that any device was close at hand which would have safely performed the task."

In the *Crookham* case, the evidence is abundant, clear, and undisputed, by the testimony of Crookham and others, that the tie-tongs, if they were necessary to be used in loading the truck, were close at hand. The tie-tongs were just as available to the men as was the lining bar. The men selected the lining bar rather than the tongs to do the work. Both tools were at the same place where the men had been working prior to loading the truck. The

decision in the *Ferguson* case was based entirely on the fact that the ice chipper, a safe instrument with which to remove the hard ice cream, was not furnished. If the ice chipper had been furnished in the *Ferguson* case as the tie-tongs were furnished in the *Crookham* case, the Court would have held that there was no jury question presented.

(3) The Charge:

"In requiring an employee in the absence of a foreman to load by hand an old fashioned, high-bedded non-dump truck (standing four feet high) instead of an ordinary truck (three feet high) with heavy water-soaked ties."

The Answer:

As previously shown in this brief there is no evidence that the Sayre truck was either old-fashioned or not an ordinary truck or that the ties were water-soaked. There is no evidence by the doctors that lifting the ties an extra foot produced the detached retina. The tong handles were 17½ inches high and if the bed had been three feet high and tongs had been used, the workmen would have had to lift 5½ inches higher to load a 3-foot bed with tongs than they would have had to load the ties by hand on a 4-foot bed. Both plaintiff's doctors testified that ordinary labor could produce a detached retina in a person of Crookham's age and who like Crookham was nearsighted. This being true there is no evidence that Crookham would not have suffered detached retina had the men used tie-tongs or had the bed of the truck been only 3 feet high or even 2 feet high. The same men, including Crookham, experienced no adverse effect in loading the same truck in the morning without tongs, and if the men or any of them had thought that tie-tongs would have been helpful, needful, or necessary in loading the ties in the afternoon some of the men would have suggested their use. There is no evidence, however slight, that Crookham's retina

would not have become detached if he had been doing just ordinary work. It could have occurred from stepping down from a curb or stepping down from a rail on to the ground or without any extra exertion. One is just as probable as the other. It is a physical fact that less energy is expended in lifting an object from an elevation 3 feet to 4 feet than it is to lift the same object from the ground to a distance or height of 1 foot. In one instance a person is bending over to do the lifting, in the other he is standing upright.

(4) The Charge:

"To permit the work buddy of Ray Crookham to leave the job to assist the truck owner in rolling back ties being loaded on his truck, thus increasing the lifting load and the burden upon the petitioner."

The Answer:

When one of the men was assisting in rolling the ties forward on the truck, there were three men left to load the ties which was only about 1/3 of the time, but even so, each workman would be lifting the maximum of 73.3 pounds for the heaviest tie and 43 pounds for the lightest tie; therefore, the three men were loading no heavier objects than Crookham, as he testified, had done many times before. He, in fact, was the largest of the men loading the ties.

Crookham, in loading the ties on the Sayre truck, was not lifting any more weight than he was at times when he, alone by himself, or at other times with another employee, lifted a tie from the ground and put it in a post hole (R. 83), while they were building fence, both the morning before and the day before the men loaded the Sayre truck. The undisputed medical testimony is that when "you tighten your abdominal muscles you send more blood up to your head and even the blood vessel can

be a factor in that kind of thing" (R. 252) The adominal muscles would be tighter when one leans over to pick up a tie from the ground and in raising it the first two feet than they would be in lifting the tie the third or fourth foot from the ground. Consequently, the proof, even the slightest, in this case does not "justify with reason the conclusion" that three men lifting the ties by hand on the Sayre truck produced an injury. The facts of this case do not meet the test of the *Rogers* case for jury submission.

We have been unable to find a F. E. L. A. case involving a detachment of a retina. There are several F. E. L. A. heart attack cases, none of which has been passed upon by this Court. In *Creamer* v. *Ogden Union Ry. & Depot Co.*, 121 Utah 406, 242 P. 2d 575, certiorari denied January 5, 1953, 344 U. S. 912, 97 L. Ed. 703, 73 S. Ct. 333, a workman suffered a heart attack while performing his duties and recovery was denied because of lack of foreseeability and consequent failure to satisfy the requirement of proximate cause. This Court, in *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 187 L. Ed. 610, 63 S. Ct. 444, 451, held that the employee must prove that the carrier was negligent and "that negligence was *the proximate cause of the injury.*" (Emphasis supplied). In *McGuigan* v. *So. Pacific* 112 C. A. 2d 704, 247 P. 2d 415, the employer knew that McGuigan had previous heart attacks but nevertheless assigned him to do a job which was more strenuous than the type of work the company doctor had recommended that he do, and as a result he had another heart attack and died. The Court stated (on page 421) that:

> "If there is any substantial evidence or reasonable inferences therefrom that would sustain findings of negligence and proximate cause, it is error to grant a non-suit. * * * The employer knew that decent (sic) had a diseased heart. The employer

> knew that twice decedent had been hospitalized for that condition. * * * When * * * (the superintendent) * * * made these representations * * * (he) * * * knew that the duties of herder were more strenuous than he had represented. * * * *It is perfectly true that there is no duty imposed on an employer to examine his employees to ascertain if they are physically fit to do the job they seek.* The case of Potter Title & Trust Co. v. Ohio Barge Line, D. C., 81 F. Supp. 108, which imposed such a duty, was reversed—3 Cir., 184 F. 2d 432, certiorari denied, 340 U. S. 955, 71 S. Ct. 567, 95 L. Ed. 689. But here the employer not only voluntarily assumed the duty, but, much more important, took it upon itself to describe the duties decedent would assume, and did so negligently." (Emphasis supplied).

In the Crookham case, no one knew of the latent condition of his left eye, not even his doctor, his employer, any of his fellow workers or himself. The fact that made the *McGuigan* case a jury case was the foreknowledge, by the employer, of the condition of McGuigan's heart, who, in spite of that knowledge, assigned him to duties which were likely to, and did cause another heart attack. In *Herdman* v. *Pennsylvania Ry., supra,* decided the same day as the *Rogers* case, this Court held:

> "In an action under the Federal Employers' Liability Act (45 USC ss 51 et seq.) to recover for injuries to a railroad conductor who fell when the train on which he was employed stopped suddenly to avoid striking an automobile, no jury question as to the negligence of the railroad is presented under the doctrine of res ipsa loquitur where there is no evidence that the stop was made with any special or unusual severity or that unscheduled and sudden stops of trains are *unusual or extraordinary*, and the conductor himself testified that such stops are not unusual or extraordinary." (Emphasis supplied.)

It will be noted that this suit was to recover for injuries to the railroad conductor who suffered the injuries when the train was put into emergency.

In the Crookham case, there is no evidence that it was not customary for section employees, whether three or four men, to lift ordinary railroad ties, or that it was "unusual or extraordinary" for three or four men to lift ordinary railroad ties. We, therefore, respectfully submit that under the holding of the *Rogers* case and especially the *Herdman* case, the lifting of ordinary railroad ties by three men or four men did not create any strain of "special or unusual severity" nor was the manner in which they were loaded on the Sayre truck by the employees in this instance "unusual or extraordinary". In fact, Crookham himself testified that previously two men and at times he alone would lift up similar ties and place them in the post holes that they were digging when they were repairing the fence along the right of way. There being nothing unusual or extraordinary in the work, and there being nothing special or unusual in the strain, consequently, under the holding of any of the cases decided by this Court since February 25, 1957, when the more liberal doctrine was laid down, the petitioner did not make a case to be submitted to the jury, and it was error for the trial court to let the case be so submitted.

In *Bennett* v. *Southern Ry. Co.*, 245 N. C. 261, 96 S. E. 2d 31, (F. E. L. A.), a brakeman was fatally struck by lightning when he was instructed to leave the "caboose" and, during an electrical storm, to perform a task near the track. The Court held that railroads are not insurers of their employees and that if ordinary experience would not have required a railroad to anticipate and provide against such a happening, then there could be no liability upon the railroad company, in that the accident was not a foreseeable one. The Court pointed out:

> it is significant that there is no evidence that the lightning of the storm struck any person or object, with the exception of the tragic death of plaintiff's intestate, ". . ". The test is whether reasonable men, examining the circumstances there and then and the likelihood of injury from lightning, would have ordered the train crew and plaintiff's intestate to make a move and pull the loaded cars out. In our opinion, after considering all the evidence in the light most favorable to plaintiff, and accepting it as true, and giving her the benefit of all reasonable inferences to be drawn therefrom, the only reasonable conclusion at which fair-minded men could arrive is that the danger at the time and place of being struck by lightning was so remote as to be beyond the requirement of due care, and, therefore, the death of plaintiff's intestate was not caused in whole or in part by any negligence on defendant's part. *Bare possibility is not sufficient.* Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. *'Events too remote to require reasonable precaution need not be anticipated.'* Brady v. Southern R. Co., supra, (320 U. S. 476, 64 S. Ct. 236). *To hold otherwise would be to make defendant an insurer.*" (Emphasis supplied.)

In *Southern Ry. Co.* v. *Bell* (1940, 4th Cir.), 114 F. 2d 341, an employee committed suicide by jumping in front of a train. In holding that the railroad company was not liable for such death, the Court stated that:

> "One is liable for only those consequences which in the light of attending circumstances could reasonably have been anticipated by a prudent man but not for casualties which, though possible, were held improbable." (Syl. 1, p. 341.)

The same work performed in the same manner by Crookham in the morning produced no adverse effect; neither he nor any other employee made any complaint to the foreman about the work; consequently, the fore-

man could not have anticipated that lifting ties in the afternoon, in the same manner, would have produced the detachment of the retina of Crookham's eye.

It is true that there are a series of strained back and hernia cases; but in the ones where recovery has been allowed, the objects lifted which produced the strain that caused the hernia or strained back, have been weights which normally have not been lifted by such men, and usually on occasions where the employee protested but was ordered to lift anyway. Typical of such type of cases is *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358, reh den 345 U. S. 4, 97 L. Ed. 1348, 73 S. Ct. 639. In the Crookham case both a lining bar and tie-tongs were available. They were on the company truck where the men were working building fence, and the men could take either one or both of such tools, if they thought it was necessary, useful or convenient to use them. The same method of loading ties was followed in the afternoon as in the morning, and at noon-time, neither Crookham nor any of the other men made any complaint, report or suggestion to the foreman that only three men were used at times instead of four.

In *Stewart* v. *B. & O. Ry. Co.*, 137 F. 2d 537, relied on by the petitioner, the facts are different than the facts here. However, Justice Hand, in deciding that case, stated:

> "Doubtless an employee cannot recover damages for every harm he may suffer through failure of his employer to provide him with the best sort of appliance unless the situation is such that the chance of injury can be *reasonably foreseen.*" (Emphasis supplied.)

We believe that the chance of injury to Crookham (even assuming that the detachment of the retina was an injury) could not have been reasonably foreseen by the foreman (the employer) when the foreman, as Crookham admits,

had sent sufficient men to load the ties; when all the men loading the ties were experienced section men, two of whom have been foremen; when no complaint was made by anyone as to the manner of loading the ties in the morning, or at any other time; when the weight that each man lifted was not more than the average section man, as well as Crookham, had often lifted before; and, when all the other men and the foreman testified that the way the ties were loaded was the safest way in which to load them.

It is the sole theory of petitioner Crookham that he had the detachment of the retina when he had the burning sensation, like sweat in his eye, after loading the second load of ties. His doctors say that such a burning sensation or pain was not produced by the separation of retina, for pain-wise one does not know when the retina separates. Take this alleged incident out of the case and petitioner does not have the least conjecture when the detachment occurred. There is no competent evidence as to when the retina detached.

After a diligent search, we have found no (FELA cases) involving a detached retina. However, even in Workmen's Compensation cases, *where no question of negligence is involved*, compensation has been denied to employees when there is no evidence of trauma to the eye, and the detachment of the retina occurred, as it did in this case, from the doing of ordinary work which the employee was employed to do.

In *Industrial Commission of Ohio* v. *Auler*, 49 Ohio App. 12, 194 N. E. 887, (1934), the Court held that such a detached retina was not an injury within the meaning of the Ohio Compensation Act. It will be noted that the Federal Employers' Liability Act applies only to "any person suffering injury". If Crookham's detached retina

was not an *injury* which he received in the course of his employment, no recovery can be had under F. E. L. A.

The facts in the *Industrial Commission of Ohio* case are:

Claimant and a fellow worker were carrying an angle iron weighing 150 pounds, a task similar to his past regular duties, when he suddenly became blind (hemorrhage of the retina).

In holding the injury not accidental, the Court said:

> "[It would not] seem that his condition was the result of a physical injury accidental in origin and cause. It is not claimed that he received any physical injury by striking or being struck by any angle iron, or by any other object, or that anything unusual occurred except that he tripped and fell as a result of dizziness a half hour before his vision failed. He was engaged in his usual employment, doing his work in the usual way. If it be said that the repeated lifting and carrying of angle irons was such work as induced (claimant's) affliction, then in the words of the Supreme Court (of Ohio) * * * 'Impairment of physical condition accruing from constant and continued labor, no matter how heavy or arduous it may be, is not covered by the Workmen's Compensation Law. Such impairment does not come within the meaning of the term "injury"' * ".

It will be noted that in the above case two employees were lifting 150 pounds, which would be 75 pounds each. In the present case, Crookham testified that the ties weighed from 125 to 220 pounds, depending on the size, which would make the average weight for three employees for the largest tie 73.3 pounds each.

In *R. G. Le Tourneau, Inc. v. Industrial Commission*, 396 Ill. 435, 72 N. E. 2d 183 (1947), involving a claim for loss of sight in one eye caused by a detachment of the

retina. Claimant contended that this detachment was caused by strain of lifting incident to his work. After two hours of work during which he handled 130 2-pound castings and 51 1-pound castings, he went to a shop meeting on the premises. He had suffered no accidents or noticeable symptoms of any kind, yet when he was reading cards at the meeting, he noticed he could not see out of his right eye. There was medical testimony that retinal detachment such as claimant suffered could be caused by a blow or the strain of heavy lifting, or by old age or debilitating diseases. While the doctors were in general agreement as to the possible causes, they could not state definitely how claimant's injury occurred except that it *could* be caused by strain or *trauma*. In reversing a judgment confirming an award of compensation, the Court held that "There is no testimony * * * that the work performed by the claimant caused the injury".

Other compensation cases dealing with a detachment of a retina of similar import and like holding, from appellate courts of Arizona, California, Pennsylvania and New York, as well as a fuller statement of the *Auler* and *Le Tourneau* cases, are set out in the Appendix to this brief. (See Appendix, pages 40-45.)

The respondent is fully cognizant of the fact that this is a case tried under the law of negligence, *as changed and amended* by the Federal Employers' Liability Act; and that the failure of some appellate state Courts to observe and abide by these changes and amendments have resulted in placing an undue and untoward burden upon this Court. However, even under the F. E. L. A., recovery is dependent upon proof of "any negligence", "proximate cause", "foreseeability" and "injury". The Supreme Court of West Virginia, with the *Rogers* and subsequent cases fully in mind, has intently perused the record of this case in search of these requirements, and

has found it wanting. It is respectfully submitted that the opinion of the Supreme Court of Appeals of West Virginia is fully in accord and not in any way in conflict with the opinions of this Court in Federal Employers' Liability Act cases and that the writ of certiorari as prayed for should be refused.

Respectfully submitted,

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August 17, 1959.